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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT RICHLAND

STATE OF WASHINGTON, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants

No. 4:19-cv-5210-RMP

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR STAY OF ORDER OR, IN THE ALTERNATIVE, FOR EXTENSION OF TIME TO PRODUCE PRIVILEGE LOG

Hearing: May 12, 2020
Without Oral Argument

I. The Court's Order Should Be Stayed Pending Resolution of Defendants' Motion to Dismiss

Plaintiffs fail to provide any persuasive reason for this Court to depart from the Supreme Court's ruling in *In re United States*, 138 S. Ct. 443 (2017), in which DHS successfully appealed an order requiring it to expand an administrative record and produce a privilege log. Plaintiffs attempt to distinguish that decision on two grounds – first, that the "the Court here ordered production only of a privilege log, while the district court in *In re United States* ordered DHS to begin producing documents, including documents DHS apparently believed were privileged." Opp'n at 5. But the Supreme Court's reasoning belies the notion that that was a fact of significance to its ruling. The Supreme Court explained that "the District Court should have granted respondents' motion on November 19 to stay implementation of the challenged October 17 order and first resolved the Government's threshold arguments" in its motion to dismiss. *In re United States*, 138 S. Ct. at 445. The reason for that was that "[e]ither of those arguments, if accepted, likely would eliminate the need for the District Court to examine a complete administrative record." *Id*. Precisely the same logic applies here. If this Court accepts Defendants' arguments in its upcoming motion to dismiss, that would eliminate the need for the Court to examine a complete administrative record. It makes no sense for Defendants to prepare a privilege log – the purpose of which is to determine whether documents must be added to the administrative record – if the case may be dismissed at the pleading stage, before the administrative record has any relevance.

Plaintiffs also try to distinguish this case from *In re United States* by arguing that

"the bases for DHS's motion to dismiss in *In re United States* were jurisdictional." Mot. at 5. But that is not a distinction because jurisdictional (standing) issues are raised here too, as Plaintiffs concede. *See id*. In any event, Plaintiffs fail to explain why the distinction between jurisdictional and non-jurisdictional arguments should matter. Either type of argument, "if accepted, likely would eliminate the need for the District Court to examine a complete administrative record." *In re United States*, 138 S. Ct. at 445. Accordingly, for the same reasons that the Supreme Court granted relief to DHS in *In re United States*, this Court should enter a stay here as well.

Next, Plaintiffs challenge Defendants' argument that Defendants are likely to prevail on their motion to dismiss because of the Ninth Circuit's opinion in *City & County of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019), which disagreed with all of Plaintiffs' merits arguments. Opp'n at 2-4. Defendants' argument was not, as Plaintiffs claim (Opp'n at 3), "expressly rejected" in *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020). That decision addresses only whether a Ninth Circuit merits panel may reconsider a decision by a Ninth Circuit motions panel. *Id*. at 1263 (discussing "[r]econsideration of a motions panel's decision by a merits panel"). It does not suggest that a *district court* may rule contrary to a published, precedential Ninth Circuit decision simply because the decision was issued by a motions panel. In any event, Plaintiffs have missed the relevant point. The issue is not whether Defendants are certain to prevail on their motion to dismiss; it is that Defendants will soon file a motion to dismiss that, if accepted, will eliminate the need to revisit the issue of the administrative record. Even if Plaintiffs were correct that *East Bay Sanctuary* permits this Court to disregard a published

Ninth Circuit opinion, the opinion at least would be persuasive. *Id*. at 1265 ("we treat the motions panel's decision as persuasive, but not binding"). The bottom line is that Defendants have, at least, reasonable grounds to move to dismiss the complaint, and that motion should be decided prior to further evaluation of the administrative record.[1]

Plaintiffs also note that the "record before the motions panel therefore did not include the agency's administrative record" and they argue that "this Court will next consider Plaintiffs' arbitrary and capricious claims with the benefit of the administrative record." Opp'n at 4. To the extent that Plaintiffs are suggesting that the administrative record has some relevance at the pleading stage, they are clearly mistaken. It is well understood that a motion to dismiss tests the sufficiency of the allegations in the complaint and that courts generally do not consider materials outside the complaint in ruling on such motions. In any event, Plaintiffs' motion to dismiss is due to be filed on May 22, 2020, which is before any expansion of the administrative record would occur.

[1] Plaintiffs' attempt to minimize the impact of the Ninth Circuit's opinion in *San Francisco* is difficult to square with their decision to seek *en banc* review of that opinion or with their repeated complaints in their *en banc* petition that the Ninth Circuit panel had published its opinion. *See Washington v. DHS*, No. 19-35914, Pet. For Rehearing En Banc, Dkt. No. 34 (9th Cir. Dec. 19, 2019). If courts were free to ignore that opinion, it would not matter whether it is published or unpublished.

II. Plaintiffs Are Not Harmed by the Absence of A Privilege Log at the Pleading Stage

Plaintiffs' claim that a stay of the privilege log production order "will seriously harm the Plaintiff States" is premised on two erroneous notions. Opp'n at 6. First, Defendants did not, as Plaintiffs claim, "state in their motion that they have not yet even begun to identify and compile assertedly privileged documents." *Id*. As Defendants stated, in response to the Court's order, "Defendants must now search the records of numerous custodians across multiple components of DHS for materials to be included on the privilege log." Mot. at 5. Defendants began that process shortly after the Court's order requiring production of the privilege log, and they have been working earnestly to determine appropriate search protocols to locate electronic documents that fall within the scope of the Court's order and to execute those protocols. This process is complicated by a number of factors, including the number of custodians and the large volume of documents, and Defendants have been working to refine their search protocols to better target the relevant materials.

Next, Plaintiffs baselessly and incorrectly suggest that Defendants may not have preserved relevant materials. Mot. at 7 ("currently unsegregated documents over which the Plaintiff States may dispute privilege, and on which they may prevail, may be vulnerable to DHS's routine deletion protocols, inadvertent loss, or other destruction"). Plaintiffs' assumption that Defendants did not follow their document preservation obligations is false. Litigation holds have been in place since the earliest stages of this case. Thus, Plaintiffs' concerns about the potential that documents may be deleted if they

are not collected to create a privilege log are unfounded and certainly do not justify denying Defendants' motion.

III. Defendants Did Not Misstate Plaintiffs' Position on the Motion

Lastly, Defendants correctly stated in their Motion that Plaintiffs do not consent to the relief requested, which was to stay the Court's order or, in the alternative, extend the time period to produce a privilege log by 90 days. Mot. at 1. Plaintiffs claim that Defendants "misstated" their position because they had offered a vague, counter-proposal. Opp'n at 7. That counter-proposal only shows that Plaintiffs did ***not*** agree to the relief that Defendants were seeking. *See Agema v. City of Allegan*, 826 F.3d 326, 333 (6th Cir. 2016) ("A counter-offer generally constitutes a rejection of the original offer.").

* * *

Accordingly, this Court should stay its Order until the Court has resolved Defendants' motion to dismiss or, in the alternative, extend the time to complete the privilege log. *See Casa de Maryland v. Trump*, No. 19-2715, Letter Order, ECF No. 105 (D. Md. Mar. 13, 2020) (staying "[a]ll proceedings related to discovery and completion of the administrative record" pending resolution of Defendants' motion to dismiss in case challenging the same DHS rule as here), attached hereto as Exhibit A.

Dated: May 12, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all users receiving ECF notices for this case.

/s/ Joshua Kolsky

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Ex. A

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
PAUL W. GRIMM
UNITED STATES DISTRICT JUDGE

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March 13, 2020

RE: Public Charge Cases
Casa de Maryland, Inc. et al. v. Trump et al., PWG-19-2715
City of Gaithersburg et al. v. DHS et al., PWG-19-2851

LETTER ORDER

Dear Counsel:

This Letter Order memorializes today's telephone conference with the parties in the *Casa de Maryland* and *City of Gaithersburg* cases regarding the Government's motion to stay the cases pending appeal (*Casa*, ECF No. 84), and Plaintiffs' requests for the Government to complete the administrative record or for leave to file motions to compel (*Casa*, ECF No.100; *Gaithersburg*, ECF No. 48).

For the reasons discussed on the telephone conference, the Government's motion to stay the cases pending appeal is GRANTED IN PART and DENIED IN PART as follows:

- All proceedings related to discovery and completion of the administrative record are STAYED;
- The parties will proceed with the Motion to Dismiss briefing;
- The parties will submit a joint status report by Wednesday, March 18, 2020 confirming that the Motion to Dismiss briefing schedule currently in place (*see Casa*, ECF No. 91) is still feasible or proposing an alternate schedule for the Court's approval.

The Plaintiffs' requests for the Government to complete the administrative record or for leave to file motions to compel are DENIED WITHOUT PREJUDICE, pending resolution of the Motion to Dismiss.

Although informal, this is an Order of the Court and shall be docketed as such.

Sincerely,

/S/ 3/17/20
Paul W. Grimm
United States District Judge